

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of:

Implementation of Sections 11 and 13  
of the Cable Television Consumer  
Protection and Competition Act of 1992

Horizontal and Vertical Ownership  
Limits, Cross-Ownership Limitations  
and Anti-Trafficking Provisions

MM Docket No. 92-264

To: The Commission

**CONSOLIDATED COMMENTS CONCERNING  
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

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## SUMMARY

Petitioners from both the cable television and SMATV industries agree with Time Warner that the 1992 Cable Act can not and should not be read to prohibit cable operators from acquiring existing SMATVs within their service areas. Neither the language of the Act nor its legislative history supports the Report and Order's interpretation. Rather, the Act was merely intended to prevent cable operators from avoiding franchise obligations through operation of unfranchised SMATV facilities. Thus, a cable operator should be free to acquire and integrate a stand-alone SMATV facility so long as it is subjected to existing franchise requirements. A SMATV facility which has been integrated into a cable system no longer provides service which is "separate and apart" from the franchised service, and thus is not subject to the cross-ownership prohibition, and for the same reason must be subject to the local franchise. Moreover, there is no reason to prohibit the acquisition of an existing SMATV which is not then interconnected, so long as it is operated in accordance with franchise requirements. Provided that the SMATV acquired will be operated pursuant to the franchise, a cable operator should be able to purchase the entire SMATV facility as a going concern, not just the SMATV operator's access rights.

NATOA's assertion that the 120 day period for approval of a transfer request should not run until an operator submits all information required by the franchising authority, at its discretion, and to its satisfaction, would eviscerate the statutory time period. Congress clearly intended franchising authorities to act in a consistent time frame, which buyers, sellers and cable subscribers across the country may all rely upon. A franchising authority with unlimited discretion to determine whether it has received sufficient information could delay the 120 day period indefinitely, and use such delays as a basis for seeking franchise

modifications or other unrelated concessions. NATOA does not suggest a single deficiency to the FCC Form 394, but rather is seeking unbridled discretion to launch an unlimited fishing expedition. The Report and Order does allow local authorities to seek information in addition to requirements of the FCC, franchise and local law, if "reasonably necessary" to determine the transferee's qualifications, but wisely does not allow such information requests to be the basis for deliberate delay.

Time Warner does not oppose NATOA's request for clarification that a franchising authority's right to review a transfer may arise from a source other than the franchise, such as state or local law, as a general proposition, provided that the source is a local law which expressly states that authority. The Commission should not, however, endorse a franchising authority's claim to authority which is said to be inferred or implied under more generalized provisions of local law, or which conflicts with the express provisions of the governing franchise contract.

Finally, Time Warner submits that the Commission properly used its broad waiver authority under the 1992 Cable Act to adopt a small system waiver, considering the interests of subscribers as well as the burdens on such systems.

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PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

Time Warner Entertainment Company, L.P. (Time Warner"), by its attorneys and pursuant to Section 1.429(f) of the FCC rules, respectfully submits these Consolidated Comments concerning the "Joint Petition For Reconsideration" filed by Multivision Cable TV Corp. and Providence Journal Company ("Multivision"); the "Petition For Clarification Or, Alternatively, For Reconsideration" filed by the National Private Cable Association and others ("NPCA"); and the "Petition For Reconsideration and Clarification" filed by the National Association of Telecommunications Officers and Advisors and others ("NATOA"),

all with respect to the Report and Order and Further Notice of Proposed Rule Making in the above-captioned proceeding ("Report and Order").<sup>1</sup>

**Cable/SMATV Cross Ownership**

Initially, it is significant that petitioners from both the cable television and SMATV industries agree with Time Warner that the 1992 Cable Act can not and should not be read to prohibit cable operators from acquiring existing SMATVs within their service areas. The language of the Act contains no such prohibition. Nor does the legislative history support the Commission's interpretation. See Multivision Petition at 3-4; NPCA Petition at 10-12.

The 1992 Cable Act makes it unlawful for a cable operator to offer SMATV service "separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system."<sup>2</sup> As Time Warner argued in its Comments, once a cable operator physically interconnects its system with an existing or newly constructed SMATV facility (by hardwire or other means), the SMATV operation can no longer be considered separate and apart, and thus the cross-ownership prohibition does not apply. Indeed, once a former SMATV becomes integrated into a cable system, it loses its protection from the requirement to obtain a franchise under 47 U.S.C. § 541(b)(1) because it no longer qualifies for the SMATV exception to the definition of a cable system pursuant to

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<sup>1</sup>FCC 93-332, released July 23, 1993; 58 Fed. Reg. 52311-12 (Oct. 7, 1993). Time Warner itself filed a Petition For Reconsideration of the Report and Order on September 7, 1993.

<sup>2</sup>47 U.S.C. Sec. 533(a)(2).

47 U.S.C. § 522(7)(B). Thus, upon integration of a former SMATV facility into an existing cable system, the entire facility becomes subject to local franchise obligations.<sup>3</sup>

Nor is there any reason to prevent a cable operator from acquiring an existing SMATV within its service area without interconnecting it, provided that the stand-alone SMATV facility is operated in accordance with franchise requirements. As the Commission reasoned, Congress merely intended that cable-owned SMATV systems be subject to existing franchise obligations,<sup>4</sup> not to prohibit cable/SMATV cross-ownership entirely. A stand alone SMATV facility operated pursuant to the same franchise requirements as the cable system is thus not providing service "separate and apart" from the franchised cable service, and hence is not subject to the cross-ownership prohibition. This logic applies equally to a newly constructed SMATV or an existing SMATV facility that is acquired by the existing cable operator.

NPCA argues that Congress did not intend to ban the acquisition of an existing SMATV operator's contractual access rights to multi-unit dwellings, but only the provision of unfranchised SMATV service to these dwellings by cable operators. It seeks clarification as to whether a SMATV operator may sell its internal wiring and components. NPCA Petition at n.5. Time Warner submits that there is no reason to limit permissible transactions to the purchase of a SMATV operator's access rights alone. As explained above, a SMATV which is interconnected with the cable operator's system, or operated on a stand-alone basis but in accordance with franchise requirements, should not be subject to the statutory cross-

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<sup>3</sup>Cf., Multivision Petition at 4-7.

<sup>4</sup>Report and Order at ¶ 122.

ownership prohibitions. Moreover, as the NPCA observes, restrictions on the acquisition of SMATVs could actually harm overall competition by discouraging investment in SMATV operators and decreasing the value of their assets. Indeed, the approach adopted by the Commission would allow the SMATV operator to sell to building management, who could then discontinue SMATV service and sell the right to provide service to the cable operator. Such an approach would provide a windfall to building management and would discourage SMATV operators from investing capital for the purpose of offering an alternative source of multichannel video programming.

The Commission's concerns with fostering competition by banning cable operators from acquiring SMATV systems is misplaced. Cable operators and SMATV systems usually do not compete head-to-head for customers within particular multiple dwelling buildings. Rather, the often fierce competition occurs in seeking rights from the building owner to provide multichannel video programming service within that building. Once such contractual arrangements are entered into, the competitive environment will not be adversely affected if the SMATV operator is allowed to sell its business as a going concern to the franchised cable operator. Building owners could still require that competitive bids be submitted when any such contracts with them come up for renewal.

Finally, the Report and Order states that the Commission's new regulations do not prevent the common ownership of "a SMATV system that itself qualifies as a cable system" and a separate, stand-alone SMATV system within the same "service area." Furthermore, the Report and Order concludes that a "SMATV system qualifying as a cable system" would

not be subject to the cable/MMDS cross-ownership restriction.<sup>5</sup> Time Warner submits that no SMATV qualifies as a cable system. A facility is a "cable system" only if it meets the statutory definition in Section 602(7) of the Communications Act:

a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.<sup>6</sup>

An exception is made to this definition for a SMATV facility:

a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public rights-of-way.<sup>7</sup>

Given the fact that SMATV systems are defined in terms of an exclusion from the cable system definition, a particular system can never constitute both, as the Report and Order erroneously suggests. Thus, any "cable system" under the statutory definition is subject to all statutory requirements applicable to cable systems, including the cable/MMDS cross-ownership prohibition. Once a SMATV loses the SMATV exemption, for example, by a hard-wire interconnect crossing a public right of way, or by providing service to single family homes, it becomes a cable system subject to all regulatory requirements applicable to cable systems.

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<sup>5</sup>Report and Order at ¶ 128.

<sup>6</sup>47 U.S.C. Sec. 522(7).

<sup>7</sup>47 U.S.C. Sec. 522(7)(B). See also FCC v. Beach Communications, Inc., 113 S. Ct. 594, 124 L.Ed. 2d 211 (1992) (upholding statutory distinction between SMATVs and cable systems).

**Antitrafficking Provisions**

1. **Informational Requirements By The Franchise Authority.**

The Report and Order adopted rules which require a franchising authority to act upon a transfer request within 120 days after the cable operator submits the information specifically required by FCC Form 394, the franchise agreement, and applicable state or local law. If the franchising authority fails to act within this time, the request is deemed to be granted.<sup>8</sup> NATOA asserts that this time period should not run until an operator submits all information required by the franchising authority, at its discretion, and to its satisfaction, regardless of whether such information is required by a franchise agreement or local law. According to NATOA, the statute suggests "no limit" on what information a franchising authority may require. NATOA Petition at 2-5.

Time Warner submits that NATOA's revision, if adopted, would eviscerate the statutory time period for local action. Congress clearly intended franchising authorities to act in a consistent time frame, which buyers, sellers and cable subscribers across the country may all rely upon. Consistency and reasonable expectations in the transfer process are of particular significance when an MSO seeks to transfer multiple systems simultaneously. For example, Time Warner's Reply Comments in this proceeding detailed the inconsistent and arbitrary responses it has received to franchise transfer requests. See Time Warner Reply Comments at 20-23. 120 days provides an ample amount of time for a franchising authority to act.

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<sup>8</sup>47 C.F.R. Sec. 76.502(i)(1) & (2) (1993).

A franchising authority with unlimited discretion to determine whether it has received sufficient information could delay the 120 day period indefinitely, and use such delays as a basis for seeking franchise modifications or other unrelated concessions. Time Warner's Reply Comments in this proceeding provided specific examples of abuses and obstacles it has faced in the local franchise transfer process, including instances where franchising authorities (1) sought to reinterpret the franchise agreement to extract new equipment and services; (2) requested volumes of information, much of which was neither used nor useful; (3) took extraordinarily long periods to act or refused to do so; and (4) used the transfer process to effect inappropriate policy objectives beyond their jurisdiction. See Time Warner Reply Comments at 20-23.

Section 617(e) of the Communications Act preemptively established 120 days as a reasonable period of time for a franchising authority to act upon a transfer.<sup>9</sup> Section 636(c) provides that any provision of a franchise or other local law which is inconsistent with the Act is deemed preempted and superseded.<sup>10</sup> Thus, whatever discretion, express or implied, that a local authority might arguably have had under a franchise agreement or local law to exceed 120 days is preempted and superseded. Moreover, the Cable Act's legislative history clearly indicates Congress's intent to limit the requisite information requested to just that which is required by FCC regulations, the franchise, and local law:

The Committee intends that the 120-day limitation on franchise approval of a sale or transfer required under subsection (e) shall not commence until the cable operator has provided the

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<sup>9</sup>47 U.S.C. Sec. 537(e).

<sup>10</sup>47 U.S.C. Sec. 556(c).

franchising authority all information required under the Commission's regulations . . . The amendment is not intended to limit, or give the FCC authority to limit, local authority to require in franchises that cable operators provide additional information or guarantees with respect to a cable sale or transfer. The subsection also is not intended to limit, or give the FCC authority to limit, a franchising authority's right to grant or deny a request for approval of a sale or transfer, in its discretion, consistent with the franchise and applicable law . . .<sup>11</sup>

The Report and Order did not prohibit local authorities from seeking additional information apart from the requirements of the FCC, franchise and local law, if "reasonably necessary" to determine the transferee's qualifications. Indeed, it requires cable operators to "promptly respond" to such requests. It does, however, properly deny local authorities the possibility of misusing this process to toll or extend the 120 day period. The Commission concluded that use of its standardized form, in connection with the 120-day limitation, "will ensure that franchise authorities are provided with sufficient information to evaluate and render prompt decisions with respect to transfer requests."<sup>12</sup> NATOA's proposal, if adopted, would negate the requirement of prompt action by the franchising authority.

The FCC has adopted a comprehensive form which requires cable operators to submit detailed information covering those issues truly relevant to the franchise transfer process. Significantly, NATOA does not suggest a single deficiency to the FCC Form 394, but rather is seeking unbridled discretion to launch an unlimited fishing expedition merely for the purpose of delay or to extract concessions unrelated to the franchise transfer process.

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<sup>11</sup>House Report, H.R. Rep. No. 628, 102d Cong., 2d Sess. 120-21 (1992) (emphasis added).

<sup>12</sup>FCC 93-332 at ¶ 86 (emphasis added).

Moreover, the interests of certainty and reasonable alienability of cable systems mandate that both buyers and sellers should be fully aware of the information which will be required in the franchise transfer process before they enter into acquisition contracts. NATOA suggests that franchising authorities should be allowed to unilaterally impose massive information requirements after a transfer request has been submitted, and which had not been previously agreed to in the franchise contract or otherwise previously validly enacted under local law. Such an approach would not only violate the express provisions of the Cable Act, but would contravene sound principles of due process as well.

Finally, NATOA's Petition threatens that a franchising authority "may have to" deny a transfer request if its request for additional information is not satisfied before the 120 day period runs. NATOA Petition at 4. Time Warner submits that a franchising authority should not be permitted to circumvent the statutory requirements by threatening to deny a transfer altogether. Congress has already preemptively determined that information not required by the FCC, franchise and local law is not essential to the local authority's determination. Nevertheless, Time Warner submits that in many cases it would be preferable for a franchising authority to deny a franchise transfer than to be able to hold the transfer request in perpetual limbo as the franchising authority concocts ever-escalating requests for irrelevant information. At least in the case of a denial, arbitrary refusals by franchising authorities to approve transfer requests would be exposed to the rigors of judicial review.

2. Local Right To Review Franchise Transfers.

Sections 76.502(g) and (i) of the FCC rules, adopted pursuant to Section 617(e) of the Communications Act, refer to the effectiveness of waivers and informational requirements

where local transfer approval is required under the franchise agreement.<sup>13</sup> NATOA requests that the Commission clarify that a franchising authority's right to review a transfer request may arise from a source other than the franchise, such as state or local law. NATOA Petition at 5-6.

Time Warner does not oppose this clarification as a general proposition, provided that the source of local authority is a state or local law which expressly states that authority. The Commission should not, however, endorse a franchising authority's claim to authority which is said to be inferred or implied under more generalized provisions of local law. As Time Warner's Reply Comments recognized, apart from the 120 day time period, Section 617 of the Communications Act does not expand or restrict the current rights of local authorities under their franchise agreements or local law. Reply Comments at 4. Of course, not all such transfers will be subject to the antitrafficking rules. Moreover, Time Warner agrees with Multivision that where a franchise or local law does not require local consent to a transfer, the requisite certification should be made to the Commission rather than the local franchising authority. Multivision Petition at 7.

3. Small System Waiver.

NATOA also opposes the blanket waiver adopted by the Commission to shield small cable systems from regulatory burdens under the antitrafficking rule, claiming the Report and Order improperly failed to consider the impact of such a waiver on cable subscribers. NATOA would make small systems subject to a case-by-case waiver request. NATOA Comments at 6-9. Time Warner submits that the Commission properly used its broad waiver

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<sup>13</sup>47 C.F.R. Sec. 76.502(g) & (i) (1993).

authority under the 1992 Cable Act to adopt a small system waiver, in light of its conclusions that (1) systems serving rural areas with low population density are unlikely to be subject to profiteering, (2) the rules would create significant costs and administrative burdens on small systems and deter expansion to rural areas, (3) the expense and delay attendant to individual waiver requests would be prohibitive to small systems and (4) a blanket waiver would reduce the burden on the FCC and affect only a small number of cable subscribers. FCC 93-332 at ¶ 90. Contrary to NATOA's claims, these considerations do include the interest of subscribers. Indeed, while NATOA claims the waiver would exempt half of all systems, the Commission has calculated that affected systems serve only 3.6 percent of all cable subscribers nationally.

### **Grandfathering**

Time Warner reiterates that the Commission should effectively grandfather transactions that might otherwise violate the three year holding requirement if such transactions were the subject of written agreements in principle or definitive agreements in existence prior to the effective date of the 1992 Cable Act.<sup>14</sup> All such preexisting contractual arrangements should be fully enforceable as legally and validly agreed to by the parties based on their legitimate expectations at the time of their agreement. To do otherwise would clearly permit retroactive interference with vested contractual rights relating to specific efforts to alienate property. "Retroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application . . . or when the

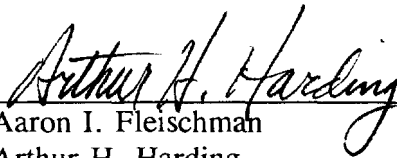
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<sup>14</sup>The antitrafficking rules became effective December 4, 1992.

hardship on affected parties will outweigh the public ends to be accomplished."<sup>15</sup> The resultant hardships on the parties to such agreements would clearly outweigh the uncertain public ends that application of this rule to such agreements might accomplish.

Respectfully submitted,

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<sup>15</sup>Iowa Power and Light Co. v. Burlington Northern, Inc., 590 F.2d 796, 812 (8th Cir. 1981) (citations omitted), cert. denied, 455 U.S. 907 (1982).

## CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 22nd day of October, 1993 placed a copy of the foregoing "Consolidated Comments Concerning Petitions For Reconsideration And Clarification" in U.S. First Class Mail, addressed to the following:


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